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SUPREME COURT OF THE UNITED STATES

October Term 1946

No. 800

UNITED STATES OF AMERICA *Petitioner*

v.

THOMAS BALOGH *Respondent*

Respondent's MEMORANDUM IN OPPOSITION to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit

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INDEX

Cases Cited

PAGE

Billings v. Truesdell
321 U.S. 542, 552 6

Brotherhood etc. v. United T. S. Employees
320 U.S. 715, rehearing denied 320 U.S. 816 1

Cahoon v. United States
152 F. 2d 752 (CCA-5) No. 183 Oct. Term 1946, cert. denied Oct. 14, 1946, 67 S. Ct. 57, pending on petition for rehearing 5, 9

Petitioner's reply to Government's memorandum in opposition, pp. 1-6 5

Dodez v. United States
— U.S. —, decided Dec. 23, 1946, slip opinion pp. 8-10 .. 3, 5

Eagles v. United States ex rel. Samuels
— U.S. —, decided Dec. 23, 1946, 15 LW 4113, 4116 8-9

Estep v. United States
327 U.S. 114, note 15 ..... 1, 2, 4, 5, 7

Eureka Bank v. Bay
90 Kan. 506, 135 P. 584 6

Falbo v. United States
320 U.S. 549 ..... 1, 2, 4, 5

Gibson v. United States
— U.S. —, decided Dec. 23, 1946, slip opinion pp. 8-10, 11 ..... 3, 4

Lewis v. Hawkins
90 U.S. 119 6

Local 167 etc. v. United States
291 U.S. 293 6

Reading Co. v. Geary
40 F. 2d 142 (CCA-3) 6

State v. Dexter
115 Iowa 678, 87 N. W. 417 6

CASES CITED *concluded*

	PAGE
Tung v. United States 142 F. 2d 919	7
United States v. Balogh — F. 2d — (CCA-2) decided Oct. 31, 1946, No. 800 Oct Term 1946, petition for certiorari, pp. 15, 27	6
United States v. Flakowicz 146 F. 2d 874 (CCA-2) cert. denied 325 U.S. 851	2
United States v. Lair 52 F. 2d 312 (DC-ND-Calif.)	8
United States v. Peterson 53 F. Supp. 760 (DC-ND-Calif.)	8
United States v. Rinko 147 F. 2d 1 (CCA-7) cert. denied 325 U.S. 851	4
No. 1071 Oct. Term 1944, Government's memorandum in opposition	5
United States ex rel. Flakowicz v. Alexander — F. Supp. — (DC-Conn.) decided Dec. 4, 1946	2-3
United States ex rel. Kulick v. Kennedy — F. 2d — (CCA-2) decided Oct. 29, 1946	2
Wells v. United States — F. 2d — (CCA-5) decided Dec. 23, 1946	4

STATUTES AND REGULATIONS CITED

Regulations, Selective Service, sec. 629.1	7
Regulations, War Department, sec. 615-500	6
United States Code, Title 50, App. secs. 301-318 ["Selective Training and Service Act of 1940" as amended Dec. 5, 1943]	2
Secs. 303, 304 (a) [57 Stat. 596, 599, Public Act 197, 78th Cong., approved Dec. 5, 1943, sec. 5]	2, 6, 7

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Respondent's MEMORANDUM IN OPPOSITION to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit

MAY IT PLEASE THE COURT:

Respondent objects to the suggestion of petitioner that the judgment of the court below be reversed simultaneously with the granting of the petition for writ of certiorari. The decision of the court below is not so plainly erroneous and egregious as to authorize such procedure. Therefore *Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees,* 320 U. S. 715, rehearing denied, 320 U. S. 816, is not applicable and should not be followed.

The very least that respondent is entitled to in this Court is a full and complete hearing upon the question presented. The decision of the court below did not amount to a refusal, *sub silentio,* to adhere to the decisions of this Court in the cases of *Falbo* v. *United States,* 320 U. S. 549, and *Estep* v. *United States,* 327 U. S. 114. The holding in the *Falbo* case was not applicable but the holding in the *Estep* case was applicable and the court below followed the *Estep* holding by considering the validity of the draft

board classification and action as did the trial court. The court below did not depart from the controlling decisions of this Court.

Respondent says that, since the Selective Training and Service Act of 1940 was amended on December 5, 1943, to require a preinduction physical examination and the determination of the acceptability to be made prior to the issuance of the order to report for induction, the administrative remedies were completely exhausted so as to make inapplicable the *Falbo* decision and applicable the *Estep* decision when Balogh received his preinduction physical examination. See 50 U. S. C. App. §§ 303 and 304 (a), 57 Stat. 596, 599.

Petitioner cites the case of *United States* v. *Flakowicz* (CCA-2) 146 F. 2d 874, certiorari denied 325 U. S. 851. The decision in that case was overruled and declared to be erroneous by the Second Circuit in *United States ex rel. Kulick* v. *Kennedy,* decided October 29, 1946. In fact, the United States District Court for the District of Connecticut, on the basis of the *Kulick* decision, on December 4, 1946, ordered Flakowicz discharged on a writ of habeas corpus. In that case the court said: "In the case at bar, unlike the *Smith* and *Estep* cases (1946) 327 U. S. 114, and the *Kulick* case (CCA-2) October 29, 1946, the petitioner refused to appear at the induction center. In that respect, it is similar to the *Falbo* case. However, at the time of Falbo's refusal to report, final determination of physical fitness and acceptability to the armed forces was made at the induction center following compliance with the order to report for induction. Subsequent to the *Falbo* case, however, the Congress required that final determination of physical fitness and acceptability to the armed forces be made upon request prior to the actual reporting for induction to avoid the hardship incident in the uncertainty of the registrant's future entrance into the armed services until time of actual induction. *Act of December 5, 1943, c. 342, sec. 5, 57 Stat. 599.*

It is true that the new requirement of Congress posed some administrative problems and led the Selective Service System to provide for cases in which examination, and determination of fitness, were not followed by induction within a ninety-day period. However, it seems plain that the Congress was attempting, insofar as possible, to provide for the completion of the administrative determination of fitness and acceptability prior to the date of actual induction, and it would seem that in practically all cases the administrative process was actually terminated upon the issuance of the certificate of fitness. . . . The amendments to the Act and regulations ended the system of final determination of eligibility, and acceptability, at that time and place, and required that it be done at some time prior to the date of induction. . . . [¶] 'All had been done which could be done' by Flakowicz. The date of induction had arrived. True, the language of the *Falbo* and *Billings* cases appears to require actual reporting at the induction center. Yet both cases involved registrants ordered to report under the system in force prior to the Congressional provision of pre-induction physical examinations and the amendment to the regulations to conform to the Congressional directive. . . . [¶] Flakowicz had taken every possible step in the administrative process. On the morning of March 8, 1944, nothing had been done by the board or the director of Selective Service to reopen his classification or postpone his induction. The only function to be performed on that morning was submission to induction. Under those circumstances the Court will not require the empty gesture of reporting and refusing in person, instead of refusing by letter, in order to allow a testing of the legality of the classification." *United States ex rel. John Flakowicz* v. *Myrl E. Alexander, Warden,* Judge J. Joseph Smith.*

* This same reasoning and interpretation on the amendment of the Act and regulations was adopted by this Court in Gibson *v.* United States and Dodez *v.* United States, decided December 23, 1946. See the slip opinion, pages 8-10.

"Exacting this would stretch the requirement of exhausting the administrative process beyond any reason supporting it. Cf. *Levers* v. *Anderson,* 326 U. S. 219." (*Gibson* v. *United States, supra,* page 11 of slip opinion.) Respondent says that this Court ought to reconsider its decision in the *Falbo* case, supra, as requested by Dodez and Gibson in Nos. 23 and 86, October Term 1946, because it is an erroneous decision which stretched the requirement of the exhaustion of administrative remedies beyond any reason supporting it.

Reference is here made to the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *Wells* v. *United States* (decided December 23, 1946) where that court held that the failure to report for induction under the circumstances did not bring the registrant under the decision of *Falbo* v. *United States, supra,* and that the court preferred to follow and apply the decision in *Estep* v. *United States, supra,* in reviewing the appeal. In that decision the court said: "The distinction between the *Falbo* and *Estep* cases is this: Falbo failed to report for the last step in the administrative process and, therefore, was denied the right to prove in a criminal trial that the induction order was invalid. Estep appeared at the induction center but refused to submit to induction; thus having pursued his administrative remedy to the end, he was permitted to defend upon the ground that his classification was illegal and his induction unauthorized. Each of the above cases is in point here, but Falbo has such a narrow application that we prefer to put our decision upon the later case, which held that, where the induction order was so contrary to law as to exceed the board's jurisdiction, its action might be interposed as a defense in a criminal prosecution."

The petitioner says that this case is similar to *United States* v. *Rinko* (CCA-7) 147 F. 2d 1, certiorari denied 325 U. S. 851, where Rinko failed to undergo the complete physical examination process at the induction center follow-

ing his reporting for induction in response to the order to report. See the Government's Memorandum in Opposition to the Petition for Writ of Certiorari in the *Rinko* case, No. 1071, October Term 1944. However, petitioner fails to recognize that this Court stated in Footnote 15 of its decision in the case of *Estep* v. *United States,* No. 292, October Term 1945, that the *Rinko* case presented exactly the same question presented to the Court in the *Estep* case. (See Note 15, page 7 of slip opinion.)

Moreover, petitioner for granting certiorari relies upon *Cahoon* v. *United States* (CCA-5) 152 F. 2d 752, certiorari denied October 14, 1946, No. 183, October Term 1946. Of course, the *Cahoon* case is still pending before this Court upon petition for rehearing. The *Cahoon* case presents to this Court precisely the same question that is presented in this case and if this Court grants certiorari in this case, it certainly ought to grant certiorari in the *Cahoon* case! *

The respondent has no objection to the granting of certiorari in this case. In fact this Court ought to grant certiorari in this case as well as the *Cahoon* case. This should be done, in a situation of this kind, to clarify the law, which appears to be in a state of great confusion on account of the *Falbo* and *Dodez* decisions' being allowed to stand together.

It is true that Balogh was accepted upon a preinduction physical examination on April 21, 1945 (R. 60-63) and was ordered to report for induction on December 18, 1945. (R. 90-93) It is also conceded that respondent was not reexamined within 90 days prior to the date he was ordered to report for induction. However, this did not prevent his previous acceptability for training and service in April from

* Reference is here made to the petitioner's reply to the Government's memorandum in opposition to the petition for writ of certiorari in No. 183, October Term 1946, Cahoon *v.* United States, pages 1-6. In such reply brief there is discussed the intent of Congress to make mandatory the determination of acceptability of the registrant thereby requiring exhaustion of administrative remedies before issuance of the order to report for induction.

being conclusive for the purpose of deciding whether he exhausted his administrative remedies.

The very fact that Balogh was given the order to report for induction without having been given a reexamination compels either one of two conclusions:

First: Section 5 of Public Act 197, 78th Congress, approved December 5, 1943 (57 Stat. 596, 599, 50 U. S. C. App. §§ 303, 304 (a)), made mandatory that his acceptability be determined before he was ordered to report for induction. The fact that he was ordered to report for induction makes it conclusively presumed that his acceptability had been finally determined before the order to report for induction was issued. The army regulations 615-500 (see petition for writ of certiorari, pages 15, 27) to the effect that an examination would not be accepted by the army more than 90 days after the examination are *ultra vires* and contrary to the amended statute and are void. They do not deprive respondent of his rights under the Act. "Thus it seems clear, as we have already said, that the Act, rather than the War Department Regulations or the Articles of War, determines the rights and duties of selectees, as distinguished from inducted men." *Billings* v. *Truesdell,* 321 U. S. 542, 552.

Moreover, the physical condition of acceptability having been proved to exist in April is presumed to continue unless and until the Government offers positive evidence that the physical condition of the respondent had changed. *Lewis* v. *Hawkins,* 90 U. S. 119; *Local 167* etc. v. *United States,* 291 U. S. 293; *Reading Co.* v. *Geary* (CCA-3) 40 F. 2d 142; *Eureka Bank* v. *Bay,* 90 Kan. 506, 135 P. 584; *State* v. *Dexter,* 115 Iowa 678, 87 N. W. 417.

Second: If it is held that the registrant must be examined within 90 days before the order to report for induction issues in order to make his acceptability conclusive so as to entitle him to claim that he has exhausted his administrative remedies, then the issuance of the order to report

for induction in this case more than 90 days following the preinduction physical examination, without having the respondent re-examined, makes the order to report absolutely void and a nullity because it is contrary to the Act of December 15, 1943, Section 5, 57 Stat. 599, and Section 629.1 of the Regulations. Section 629.1 specifically provides that "Every registrant, *before* he is *ordered* to report for induction, *shall be given a preinduction physical examination* under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent." (Emphasis added) The intention and meaning of this regulation is clarified in the language of the old regulation when Section 629.1 was first promulgated: "The armed forces will not accept the results of a preinduction physical examination after 90 days. Therefore, when a registrant's induction will shortly occur and it appears that the date fixed for his induction will be more than 90 days after the date of his preinduction physical examination, he will be given a new preinduction physical examination before he is ordered to report for induction unless the Director of Selective Service or the State Director of Selective Service directs otherwise." *

Therefore the language of this Court in *Estep* v. *United States* controls here: "It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11. That case would be comparable to *Tung* v. *United States*, 142 F. 2d 919, where the local board ordered a registrant to report for induction without allowing him the appeal to which he was entitled under the regulations." See page 5 of slip opinion, 327 U. S. 114.

The decision in *Tung* v. *United States* applies here. In the *Tung* case the defendant did not report for induction. Under the Government's argument he had not exhausted

* This old regulation was taken out by amendment in July 1944.

his administrative remedies because the order to report was a nullity inasmuch as it was issued in violation of the Act and Regulations. Therefore, for the same reason, it must be held that the order to report in this case is a nullity because it was issued without a preinduction physical examination by the army to finally determine his acceptability, and that it was not necessary for the respondent to report. Furthermore, the decisions in *United States* v. *Peterson* (DC-ND-Calif.) 53 F. Supp. 760, and *United States* v. *Lair* (DC-ND-Calif.) 52 F. 2d 312, apply here.

The fact that the theological panel, that heard the respondent and recommended that he be denied his claim for exemption as a student preparing for the ministry and as a minister of religion under § 5 (d) of the Act, was not composed of Jehovah's witnesses and was made up of members of other faiths who applied the doctrine and principles of the orthodox religions in determining whether respondent was a minister of Jehovah's witnesses is such a rank departure from procedural due process as to require the reversal of the case.

This question was left specifically open for decision by this Court in *Eagles* v. *United States ex rel. Samuels*, No. 59, October Term 1946, decided on December 23, 1946, where this Court said: "Distinct questions would be raised if a registrant of one faith were referred to a theological panel on which his faith was not represented. See *United States* v. *Balogh*, — F. 2d —, decided October 31, 1946." (15 L. W. 4113, 4116)

The recommendation of this illegally constituted theological panel that illegally considered and judged the respondent's case was relied upon by the draft boards in this case and therefore vitiated the entire proceedings. This being a criminal case, it being stipulated that the boards actually considered the theological panel's recommendation, and the presumption of innocence being a stronger presumption than the presumption of legality of the administrative

proceedings, it cannot be here held that the presumption that was relied upon in the *Samuels* case, *supra*, can be invoked.

Furthermore this is the same procedural due process question that is now posed to this Court in the *Cahoon* case, *supra*, where the board of appeal considered and decided the registrant's case and denied his claim for exemption solely upon the information obtained from a book that was read by the chairman of the board of appeal, the origin and authenticity of which book is unknown.

Counsel for respondent again requests the Court to grant the petition for certiorari in the *Cahoon* case and hereby consents to the grant of the petition in this case. The Court should call both cases in for argument and decision. Certainly this case should not be decided and the judgment reversed simultaneously with the granting of the petition for certiorari as suggested by the petitioner.

WHEREFORE, for the reasons above stated, the respondent does not object to the granting of the writ of certiorari and says that the writ prayed for in the *Cahoon* case (*Cahoon* v. *United States*, No. 183, October Term 1946) should be granted. Moreover, it is not appropriate to reverse the judgment below without further briefs and arguments in this case. On the contrary this case should be set down for argument, along with the *Cahoon* case, and these important questions that remain undecided by this Court be heard and considered before decision in order that justice be done.

Respectfully submitted,

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December 31, 1946